Filed 11/2/10 In re R.R. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R. R., et al., Persons Coming Under the Juvenile Court Law.	B222048 (Los Angeles County Super. Ct. No. CK70572)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ELISANDRO R., Defendant and Appellant.	

APPEAL from orders of the Superior Court for Los Angeles County, Marilyn Martinez, Referee. Affirmed.

Kimberly A. Knill, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Denise M. Hippach, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Elisandro R. (father) appeals from orders of the juvenile court summarily denying his Welfare and Institutions Code[1] section 388 petition and terminating his parental rights to his daughters, R.R. and N.R. We affirm both orders.

BACKGROUND

On October 31, 2007, the Los Angeles Department of Children and Family Services (the Department) filed a petition alleging that R.R., N.R., and a third child, Ruben G.,[2] were children described under section 300. The petition alleged that the children's mother, Jessica G. (mother), has an unresolved history of substance abuse and is incapable of providing regular care to her children, and that father failed to provide the children with the necessities of life. The petition was filed after 10 months during which the Department attempted to work with mother to address her substance abuse and parenting issues. During (and before) that time, R.R. and N.R. were living with Maria G., their maternal grandmother; they were four and almost three years old, respectively, when the petition was filed. Although the petition alleged that father's whereabouts were unknown, at the detention hearing mother stated that father was incarcerated at Centinela state prison.[3] The juvenile court found father to be an alleged father, and ordered the children detained from mother.

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

[2] Ruben is not father's child. Also, during the course of these proceedings, the children's mother had two more children with another man. Because only R.R. and N.R. are at issue in this appeal by father, our recitation of the facts will be limited to those facts relevant to those two children and father.

[3] Father was convicted of attempted robbery in early 2005, when N.R. was a few months old and R.R. was a little over a year old, and was sentenced to six years in prison.

In the jurisdiction/disposition report filed in advance of the pretrial resolution conference on November 26, 2007, the Department reported that father was named on R.R.'s and N.R.'s birth certificates, copies of which were attached to the report. The conference was continued as to father, however, because the Department had not submitted a removal order for him, and therefore he was not present. Father appeared, in custody, for the first time at the next hearing, held on December 17, 2007. The juvenile court noted at that hearing that it had found him to be an alleged father, and asked, "Anything further on paternity?" Father's appointed counsel replied, "No, Your Honor." The court sustained an amended count of the petition against father, and specifically ordered that father receive no reunification services because, as an alleged father, he did not have a right to reunification.

At the next hearing, a six-month review hearing held in May 2008, a new appointed attorney was substituted in to represent father, who was not present. The attorney asked that the hearing be continued because father was not present. Counsel for the Department noted that, as an alleged father, father did not have the right to be present at review hearings, and argued against a continuance. Nevertheless, the juvenile court continued the hearing, due to problems with notice to mother, and granted father's counsel's request for a removal order to allow father to be present.

Father was present, in custody, at the next hearing, held on June 2, 2008. His attorney asked the court at that hearing why he was not granted family reunification services, and the court explained it was because he was only an alleged father. The attorney stated that she would likely file a section 388 petition to change that order. In the meantime, the court ordered that reunification services for mother be discontinued and set a date for a selection/implementation hearing under section 366.26.

No section 388 petition was filed before the date of that section 366.26 hearing held more than three months later, on September 17, 2008. At that hearing, another new appointed attorney was substituted in to represent father. The matter was continued to December 2, 2008, to allow the Department to complete a home study for Maria G., the maternal grandmother who was the children's caregiver and wanted to adopt them. Before the next hearing, Maria G. was found to have a very serious medical condition with a poor prognosis, which caused several delays in holding the section 366.26 hearing. The December 2 hearing was continued to March 25, 2009, to allow the Department to identify other relatives who would be willing to co-adopt with Maria G. and to complete a home study for those relatives. The hearing was continued yet again in March, due to difficulties in finding relatives willing to co-adopt the children. Before the March 2009 hearing was continued, however, father's attorney informed the court that she intended to file a section 388 petition regarding the court's finding that father was an alleged father; she contended that he should have been found to be a presumed father.

Two months later, on May 29, 2009 -- 17 and a half months after father made his first appearance in this case -- father's attorney filed that section 388 petition, asking the court to vacate the order finding father to be an alleged father and to enter a new order finding him to be a presumed father and granting him reunification services. The court set the matter for hearing on July 9, 2009. In the meantime, at the continued section 366.26 hearing on June 24, 2009, yet another new attorney was substituted in to represent father; that hearing was continued again to October 22, 2009, due to problems finding a relative to co-adopt with Maria G.

The Department did not object to father's request for a modification of the paternity finding, but opposed his request for reunification services, arguing the

juvenile court had authority to deny services to father even if he is a presumed father, under two statutory exceptions. The first exception, found in subdivision (b)(12) of section 361.5, provides that the court must deny services to a parent who has been convicted of a violent felony, as defined in subdivision (c) of Penal Code section 667.5, unless the court finds by clear and convincing evidence that reunification would be in the child's best interest. The second exception is found in section 361.5, subdivision (e)(1), which applies when a parent is incarcerated or institutionalized. In such cases, the court must order reasonable services to the incarcerated or institutionalized parent unless the court finds by clear and convincing evidence that those services would be detrimental to the child. The Department argued that the court should find that ordering services for father would be detrimental to R.R. and N.R., under subdivision (e)(1), but in any event it *must* deny reunification services to father under subdivision (b)(12) because father was convicted of robbery.[4]

The juvenile court granted father's request to modify the paternity finding, and found that he was a presumed father. But the court denied reunification services under section 361.5, subdivisions (b)(12) and (e)(1), finding by clear and convincing evidence that father had been convicted of a violent felony and that reunification services would be detrimental to the children, based upon the age of the children, the fact that father had been incarcerated for almost their entire lives

[4] The Department incorrectly stated that father had been convicted of robbery, which is a violent felony under Penal Code section 667.5, subdivision (c)(9). But the criminal history printout provided by the Department of Justice shows that he was convicted of *attempted* robbery, which is not a violent felony under Penal Code section 667.5. Although it is possible that the conviction qualifies as a violent felony under subdivision (c)(8) of that statute because the printout indicates that father used a firearm in the commission of the crime, that subdivision applies only if the firearm use is charged and proved under certain statutes, and the printout does not indicate the statute under which father was charged.

and was serving a sentence that was due to run into 2011, and the absence of any parent/child bond. Father did not appeal from the order denying in part his section 388 petition.

The continued section 366.26 hearing, scheduled for October 22, 2009, was continued yet again because father was not present, despite a statewide removal order. At the next hearing, on December 14, 2009, a new appointed attorney was substituted in to represent father (this was father's fifth attorney in two years). The attorney asked that the permanent plan be legal guardianship, rather than adoption, and asked that the section 366.26 hearing be set for contest. In response to the court's request for an offer of proof, the attorney noted that father had completed certain programs while incarcerated, and that he would be out of custody soon and could provide a home for the children. The court denied the request for a contested hearing, on the grounds that the only relevant issues were whether the children were likely to be adopted and whether any exceptions to adoption applied, neither of which would be addressed by father's offer of proof. The hearing had to be continued to February 1, 2010, however, so the Department could complete a home study for the relatives who wanted to adopt the children.

On January 15, 2010, father's new attorney filed his second section 388 petition, asking the juvenile court to modify its July 9, 2009 order denying him reunification services. As new evidence or changed circumstances in support of the petition, the petition stated that since July 2009, father had completed an "Alternatives to Violence" program, was working on his G.E.D., and had attended Alcoholics Anonymous, Narcotics Anonymous, and "Successful Parenting" programs. The petition stated that the proposed modification would be in the best interests of the children because father was denied incarcerated parent visitation, and his attempts to contact the children through telephone calls and letters were stymied by Maria G.

The juvenile court denied father's second petition without a hearing, finding that the petition did not present new evidence or a change of circumstances from the first petition, and that the proposed modification would not promote the children's best interests because they were receiving permanence and stability with relative caretakers and were soon to be adopted. Two weeks later, the final section 366.26 hearing was held. Father's attorney again asked that the matter be set for contest so father could show there was a parent/child relationship. The court asked father when he had his last visit with the children, other than in connection with court visits. Father said he had not had any visits since he was incarcerated (which was five years before), although he said he had tried to get visits with them. The court declined to set the matter for contest, noting that the children were now five and six years old, and ordered parental rights terminated.

Father timely filed a notice of appeal from the order summarily denying his second section 388 petition and the order terminating his parental rights.

DISCUSSION

Father argues on appeal that the juvenile court abused its discretion by denying his second section 388 petition without an evidentiary hearing. We disagree.

"Section 388 permits a parent to petition the court on the basis of a change of circumstances or new evidence for a hearing to change, modify or set aside a previous order in the dependency. The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) A section 388 petition "must be liberally construed in favor of its sufficiency [citation] and a hearing may be denied only if the application fails to reveal any change of circumstance or new evidence which might require a change of order. Only in this limited context may

the court deny the petition ex parte." (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.) In other words, to be entitled to a hearing on a section 388 petition, the parent needs only to show "probable cause" that there is a change of circumstance or new evidence that might require a change of order; the parent does not need to establish a probability of prevailing on the merits. (*Id.* at p. 1414.)

The petition in this case showed no such "probable cause" because father failed to cite to any changed circumstance or new evidence that related to the reasons for the order father sought to change, i.e., the order denying him reunification services.

As noted above, one of those reasons was that father had been convicted of a violent felony. Although, as we discussed in footnote 4, *ante*, the evidence does not support a finding by clear and convincing evidence that father was convicted of a "violent felony" as defined by Penal Code section 667.5, it does show that he was convicted of attempted robbery while using a firearm, which is a factor the juvenile court properly considered in determining under section 361.5, subdivision (e)(1), that reunification services would be detrimental to the children. None of the new evidence or changed circumstances father presented in his second section 388 petition related to the court's use of his conviction as a reason for denying him reunification services. Nor did the new evidence or changed circumstances relate to any of the other factors the court considered in determining that services would be detrimental to the children -- i.e., the age of the children, the fact that father had been incarcerated for almost their entire lives and was serving a sentence that was due to run into 2011, and the absence of any parent/child bond.

Relying upon *In re Hunter S.* (2006) 142 Cal.App.4th 1497, however, father argues that the juvenile court erred by denying a hearing on his petition because he was never provided with incarcerated parent services or visitation. His reliance is misplaced. In *Hunter S.*, the juvenile court ordered that the mother of a child

declared to be a dependent child be provided reunification services and visitation, but the child refused to visit or speak with the mother. (*Id.* at p. 1501.) After reunification services were terminated, the mother repeatedly asked the court to enforce the visitation order, but the court failed to do so. (*Id.* at pp. 1502-1503.) Eventually, she filed a section 388 petition, seeking to vacate the selection and implementation hearing, and reinstatement of reunification services, based on a substantial change of circumstances (she was no longer incarcerated, and was sober and employed). (*Id.* at pp. 1503-1504.) The juvenile court granted a hearing on the petition, held in conjunction with the section 366.26 hearing, but denied the petition on the ground that the mother had failed to demonstrate the requested change was in the child's best interest. The court then terminated the mother's parental rights. (*Id.* at p. 1504.) The appellate court reversed. It held that denial of the petition was an abuse of discretion "because it was the court's last opportunity to rectify three years of errors in failing to enforce the visitation orders, errors which led inexorably to erosion of the intimate bond she once shared with her son." (*Id.* at p. 1506.)

In this case, the failure to provide incarcerated parent services and visitation was not due to an error by the juvenile court that needed to be rectified through a section 388 petition. Rather, it was due to father's inaction. Father was found to be an alleged father at the detention hearing, which meant that he was not entitled to reunification services. (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) He did not challenge that finding when he made his first appearance in this case, and waited almost 18 months to file his first section 388 petition seeking to change his paternity status to presumed father. By that time, the children had found permanence and stability in the care of relatives who wanted to adopt them. As the Supreme Court found, a biological father's delay in seeking presumed father status and reunification services cannot extend the 18-month statutory limit on the

provision of reunification services and delay the selection of a permanent plan for a child in the dependency system. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 452.) In short, unlike the situation in *In re Hunter S.*, *supra*, 142 Cal.App.4th 1497, in this case the juvenile court did not err by denying father services to which he was entitled, and thus the court did not abuse its discretion by denying father's section 388 petition.

DISPOSITION

The orders are affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.